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## THE NEW MENTAL DISORDER DEFENCES: SOME COMMENTS

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Recently the provisions of Part 7 of the Criminal Justice and Licensing (Scotland) Act 2010 came into force. This development was hardly noticed and largely mirrored the lack of scrutiny of these provisions during the Parliamentary progress of the Bill. This is perhaps surprising as the Part 7 of the 2010 Act abolished the common law defences of insanity, diminished responsibility and insanity as a plea in bar of trial, and replaced them with new statutory versions of the defences. These changes substantially implemented the recommendations of the Scottish Law Commission (SLC) whose report provides some useful guidance on the background and understanding of the new law (see Report on Insanity and Diminished Responsibility (Scot Law Com Report No 194 (2204)).

In this paper I wish to make some comments on the old and new law in relation to insanity as a defence and diminished responsibility. But I will make some brief references to the plea in bar of trial.

### Location of the new law

Part 7 of the 2010 Act provides for 3 new mental disorder defences by adding new sections to the Criminal Procedure (Scotland) Act 1995, namely section 51A (criminal responsibility of mentally disordered persons), section 51B (diminished responsibility), and section 53F (unfitness for trial). This seems odd, for as both the long and short titles of the 1995 Act make clear, the scope of the Act is limited to criminal procedure. It could possibly be argued that unfitness for trial relates to procedural matters but defences such as those in section 51A and 51B are clearly part of substantive criminal law. It is, of course, the case that there are many provisions in the 1995 Act which deal with mental disorder but these relate to the procedural consequences of establishing this defence, and there is little if anything on the procedural consequences of a finding of diminished responsibility. A more natural home for these provisions would have been another statute of 1995, namely the Criminal Law (Consolidation) (Scotland) Act 1995.

### The new 'insanity' defence

#### *(a) the name of the defence.*

The SLC considered that the word insanity was stigmatising and no longer in medical usage, and recommended that it should be removed from legal terminology. The 2010 Act implements this recommendation in relation to both the substantive defence and the plea in bar of trial. However, the Act does not provide a name for the new substantive defence. Section 51A of the amended 1995 Act has the section name of 'criminal responsibility of persons with mental disorder', and throughout the rest of the 1995 Act the defence is referred to 'as the defence set out in section 51A of this Act'. It is

unfortunate that neither the SLC nor the Scottish Parliament could come up with a convenient short name for the defence. It was thought that the expression 'mental disorder defence' was inappropriate, for that is a generic term which equally applies to the defences of diminished responsibility and unfitness for trial. It is to be hoped that the defence will not continue to be referred to as the insanity defence, and if the phrase 'section 51A defence' is too cumbersome then the 'mental disorder defence' would be a suitable alternative, despite its inexactitude.

*(b) the substance of the defence: appreciation of conduct*

At common law the test for insanity has moved on very little since the writings of Hume in the late 18<sup>th</sup> Century. According to Hume (I, 37) there were two criteria, first a presence of a disorder which, secondly, results in an 'absolute alienation of reason'. The new law adopts this same structure for the defence. It requires the presence of a mental disorder (defined as a mental illness, personality disorder, or learning disability) but it removes the condition of alienation of reason, and instead requires that at the time of the act in question the accused by reason of a mental disorder was unable to appreciate the nature or wrongfulness of his conduct.

At first sight, this definition looks very similar to the much-criticised test in the M'Naghten Rules in English law, which focuses on the requirement that because of a disease of the mind an accused person did not know the nature and quality of his act or did not know that what he was doing was wrong. These rules have been widely criticised as being too narrow in focus. Someone may well understand the nature of the specific act which he is doing but still be acting in a disordered way and therefore should not be held criminally responsible for what he did (for example, a man who wages a campaign to kill his neighbours as he believes they are aliens from another galaxy). But the term 'appreciate' in the new Scottish test avoids the narrowness of the M'Naghten approach, for it turns attention to the wider issue of whether the accused had a full understanding, not only of the specific actings, but the whole context in which those actings occurred.

The SLC Report provides give two useful illustrations of how the appreciation test works. One case is where an accused suffering from schizophrenia has pointed a gun and shot his victim because he hears voices telling him that the victim was the devil incarnate. Here the accused knew precisely what he was doing in firing the weapon but his fuller understanding of his action was distorted by the mental illness. Another case is of a woman with depression who smothers her children to death as this is the only way to save them from the consequences of her own bad parenting. In this situation the accused may well know that she is doing something which is wrong (both legally and morally) but her mental disorder gives her a reason for overriding otherwise binding legal and moral norms.

*(c) The exclusion of psychopathy*

Many legal systems exclude the condition of psychopathy from the insanity defence. It was never clear whether this condition fell within the scope of the defence at common law but the new statutory test expressly excludes it. The condition of psychopathic personality disorder has various symptoms but generally refers to the general scenario

where a person in a general sense understands social norms but does not apply them to his own conduct, especially in relation to anti-social conduct. Such a person fully understands (ie appreciates) his own conduct but has a weakness in conforming that conduct to accepted standards. Although the term psychopath is not defined as such in mental health legislation in Scotland, the concept is recognised for various purposes, and the formulation used to describe the condition is a personality disorder characterised solely or primarily by abnormally aggressive or seriously irresponsible conduct. As such, a person with this type of personality is not wholly lacking in responsibility and accordingly 2010 Act makes matters clear by expressly excluding the condition of psychopathy from the scope of the new test for the mental disorder defence.

*(d) Volitional disorders*

A long-standing criticism of the M'Naghten Rules is that they focus solely on cognitive, or knowledge-based, aspects of mental disorder. It has been pointed out that some mental disorders involve problems with a person's ability to control his conduct (so-called volitional disorders). Accordingly, many legal systems which use the M'Naghten Rules buttress the definition of the defence by adding a volitional element to the test. For example, the definition of the insanity defence in the Irish Criminal Law (Insanity) Act 2006, s 5 adds to the M'Naghten-style criteria of knowledge of the act, the alternative that the accused "was unable to refrain from committing the act".

It may well be that the common law test in Scots law included a volitional element. For example, in *HM Advocate v Kidd* 1960 JC 61 Lord Strachan (at 70), in his direction to the jury included the direction that: "There must have been some mental defect, to use a broad neutral word, a mental defect, by which his reason was overpowered, and he was thereby rendered incapable of *exerting his reason to control his conduct and reactions*" (emphasis added). Similarly, Hume (I, 37) in explaining the meaning of 'absolute alienation of reason' refers to the effect on the accused that it "gives him up to the impulse of his own distempered fancy."

However, the new test in Scots law contains no such volitional prong; the sole criterion is lack of appreciation of the nature or wrongfulness of conduct. This perhaps surprising omission is based on a recommendation of the SLC, who took the view that what often looks like a volitional disorder on the part of an accused typically involves a lack of understanding or appreciation of his conduct. Indeed, the words of both Hume and Lord Strachan can both be read in this way. Someone who does not, or cannot, control his actings as a result of a mental disorder does so as a result of disordered reasons for acting; that is, the failing is cognitive, not volitional. The Commission did consult on the point whether a person with a mental disorder could have a complete or proper understanding of his conduct but still be unable to control what he did, and was impressed by the response that there were unlikely to be any such condition.

*(e) Right to raise the defence*

A further issue where the new law removes some doubt in the common law is in respect of who may raise the defence. There was some, thought scant, authority, suggesting that the Crown could raise the issue of insanity as a defence. Under the 1995

Act, as amended by the 2010 Act, it is clear that only the accused may do so, and he has the option not to raise it if he so wishes. Where an accused raises the mental disorder defence, he bears a legal (rather than an evidential) burden of proof, which is discharged by proof on the balance of probabilities. It should be borne in mind that the question of an accused person deciding whether or not to raise the defence presupposes that he is fit to face trial. The position in respect of the new plea in bar of trial remains as before, namely that the matter of fitness for trial may be raised by the defence, the Crown or by the court itself.

### The statutory version of the plea of diminished responsibility

#### *(a) the statutory test for diminished responsibility*

The new test for diminished responsibility in section 51B of the 1995 Act is that the plea applies "if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind."

As this formulation is essentially a statutory re-statement of the test laid down in *HM Advocate v Galbraith* 2002 JC 1, it might be asked if this is missed opportunity for more substantial reform. Two points may be made here. The first is that although the test in *Galbraith* was accepted by many commentators, it still attracted some criticism, which suggests that change was needed. One particular criticism was that the decision in *Galbraith* involved a borrowing of the test in English law set out in section 2 of the Homicide Act 1957. (See, in particular, James Chalmers, "Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate* (No 2) (2002) 6 *Edinburgh Law Review* 108). Given that the test in the 1957 Act was for long been heavily criticised, for Scots law to borrow this part of English law was not only undesirable in its own right but to retain the same test in the new law is ironic as English law itself has recently adopted a new definition of the plea in the Coroners and Justice Act 2009.

But is it correct to say that the *Galbraith* test (and its new version in the 1995 Act) involves an 'Anglicisation' of the Scots law of diminished responsibility? Chalmers himself claims no more than that the Court in *Galbraith* used two expressions, 'abnormality of mind' and 'substantially impaired', which are used in the 1957 Act. But this is quite different from claiming that the *Galbraith* decision borrowed the substance of that test which refers to a person "suffering from such abnormality of mind ... as substantially impaired his mental responsibility for his acts and omissions." Scots law as reformulated by the Court in *Galbraith* and under statute rightly avoids the question-begging criterion of impairing mental responsibility and focuses instead on the effect of mental impairment on controlling conduct. As noted, English law itself has a new test for diminished responsibility, which was introduced by section 52 of the Coroners and Justice Act 2009. This provision amends the definition of diminished responsibility in the 1957 Act and the defences now applies where the accused is suffering from abnormality of mental functioning which substantially impairs his ability to (a) understand the nature of his conduct; (b) to form a rational judgment; or (c) to exercise self-control. If anything, the new definition in English law is more like the *Galbraith* formulation than Scots law since *Galbraith* is like the test in the earlier version of the

1957 Act (though there is little evidence that *Galbraith* was the model for the reform of English law).

A second point about retaining what is essentially the *Galbraith* test in the new law is that this followed a recommendation of the SLC. At the time of making this recommendation the Commission had in mind a future project on the law of homicide and the thinking of the Commission was that the whole issue of partial defences to murder (currently diminished responsibility and provocation) could be fully considered in the context of that project. (The Scottish Law Commission has since included the law of homicide as part of its 8th Programme of Law Reform.)

*(b) scope of the plea*

There is direct authority that at common law the plea of diminished responsibility was available only to a charge of murder. For example, in *Brennan v HM Advocate* 1977 JC 38 Lord Justice General Emslie (at 47) described it as "a defence available only where the charge is murder and which, if it is established, can result only in the return of a verdict of guilt of the lesser crime of culpable homicide." However both in the older law and in more recent decisions it has been suggested that diminished responsibility may extend to other offences. In *HM Advocate v Kerr* 2011 SLT 430, the Court held that the plea could apply to a charge of attempted murder, although it gave no reason for distinguishing earlier decisions which held that diminished responsibility was limited to cases of murder.

It is clear that the statutory defence applies only in cases of murder. However, the uncertainty of the common law on the scope of the plea has given rise to a complication about the commencement of the new mental disorder defences and the abolition of their common law equivalents (discussed below).

*(c) application to psychopathy*

Ever since the decision of *Carraher v HM Advocate* 1946 JC 108 the common law doctrine did not apply where the accused had a psychopathic personality disorder. The SLC noted that the Court in *Carraher* gave no reason for this exclusion apart from a fear that allowing the plea in cases of psychopathy could give rise to 'trial by psychiatry'. The Commission pointed out that many issues in a criminal trial, including the application of the insanity defence and the plea of diminished responsibility itself (no matter how defined), would almost always involve psychiatric evidence and it was not obvious why evidence on psychopathic disorder was any different from evidence on any other psychiatric issue. The Commission also noted that English law did not exclude psychopathy from the scope of diminished responsibility. It recommended that the exclusion of psychopathy should not be carried over into the new statutory version of the plea, and this recommendation was implemented by the 2010 Act.

*(d) diminished responsibility and intoxication*

In *Galbraith* the Court, following dicta in *Brennan v HM Advocate*, held that the plea of diminished responsibility could not be founded on a state of intoxication. This rule is probably based on the same public policy which disallows voluntary intoxication as excusing a person from criminal liability. However, the rule might be misunderstood as

saying that a plea of diminished responsibility cannot be made where at the time of the killing the accused was intoxicated, which is a different matter altogether. In the English case of *R v Dietschmann* [2003] 1 AC 1209, the House of Lords held that the defence could apply where at the relevant time the accused had been intoxicated and was also suffering from an unrelated mental abnormality. The SLC recommended that a similar approach should be taken in the new test for diminished responsibility. In other words, although acute intoxication does not by itself constitute diminished responsibility, the fact that the accused was intoxicated at the time does not prevent diminished responsibility being established on the basis of some other mental condition. A provision to this effect is now set out in section 51B of the 1995 Act.

#### Commencement of the new law

In general terms, the new law operates in respect of proceedings commenced on or after 25 June 2012 and the common law defences are abolished as of that date (SSI 2012/160). The key date here is the start of proceeding not the date of the acts giving rise to the offence. This involves a degree of retrospectivity. If a trial begins in December 2012 in respect of a crime said to have been committed in March of that year the test for an 'insanity' defence or a plea in bar of trial are those under the statute, not the common law. (As the statutory defences probably operate to give greater protection to the accused than the common law defences, it is thought that there is now issue here of breaching the ECHR requirement that criminal liability cannot be imposed retrospectively.)

But the position is different in respect of diminished responsibility. Here the common law continues to apply to proceedings commenced on or after 25 June 2012 where the conduct took place before that date. Where the conduct occurred after that date the new test for diminished responsibility will apply. The reason for not allowing retrospective application of the new law is the uncertainty (noted earlier) as to whether diminished responsibility covers offences other than murder. Where a trial involves conduct before, but only before, 25 June 2012 the plea could apply in whatever range of non-murder cases the common law allows for (a question on which there is a noticeable lack of clarity).